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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re E.G. et al., Persons Coming Under the  
Juvenile Court Law.

B208320  
(Los Angeles County  
Super. Ct. No. CK68160)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ELIZABETH G.,

Defendant and Appellant;

JOE P.,

Defendant and Respondent.

APPEAL from orders of the Superior Court of Los Angeles County.  
Terry T. Truong, Juvenile Court Referee. Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Respondent.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel and William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

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Elizabeth G. (mother) filed notices of appeal pertaining to: (1) the denial of her petition under section 388 of the Welfare and Institutions Code<sup>1</sup> seeking the return of her children, N.G., E.G. and A.L. (the minors); and (2) the termination of jurisdiction as to N.G. and the granting of joint legal and sole physical custody to N.G.'s father, Joe P. (Joe). On appeal, mother argues that the juvenile court erred when it terminated jurisdiction as to N.G. and granted custody to Joe, and also when it found that there was a substantial risk to N.G., E.G. and A.L. if they were returned to mother's custody. We find no error regarding the award of custody of N.G. to Joe. Any challenge to the denial of mother's section 388 petition was waived because she did not present argument. We have no jurisdiction to review the juvenile court's substantial risk findings. If we did, we would find no basis to reverse.<sup>2</sup>

### **FACTS**

E.G. was born in 2000, N.G. in 2003, and A.L. in 2005. Off and on, N.G. resided with her paternal grandmother. For the first three years of N.G.'s life, Joe was in prison. During his incarceration, Joe sometimes saw N.G. on visiting day.

On May 3, 2007, a third party reported that mother was a methamphetamine user and had physically abused A.L. The Los Angeles County Department of Children and Family Services (Department) filed a section 300 petition on behalf of the minors alleging that they were at risk of harm due to physical altercations between mother and John L. (John), John's use of drugs and alcohol, and mother's failure to protect the minors from John.

A social worker interviewed members of the family. Mother said that C.L. was the father of E.G., Joe was the father of N.G., and John was the father of A.L. Mother

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

<sup>2</sup> We take judicial notice of the juvenile court's November 17, 2008, minute order returning E.G. and A.L. to mother's custody. As to them, mother's appeal is moot because a reversal would not afford any relief.

reported having an alcoholic father who was abusive toward her and the minors. E.G. reported that maternal grandfather had hit the minors with a belt. In assessing the family's needs and situation, the social worker concluded that mother did her best to be an appropriate parent. But she needed assistance with child care, and she did not have income. Further, she entered and stayed in an abusive relationship with John. Mother negligently allowed the minors to spend time with their maternal grandmother despite knowing that maternal grandfather was physically abusive, and that an uncle residing with the maternal grandparents had a substance abuse problem.

The minors were released to mother pending further order of the juvenile court. That further order came after a parole compliance check of her home on June 29, 2007. She was living with Adam O., who was on parole, and officers found drug paraphernalia<sup>3</sup> and stolen identification cards in mother's room. She said she got the items from a Temple Street gang member who was burglarizing cars and stealing items of perceived value. A friend showed her how to obtain an identity and use it for fraudulent means. She admitted to scanning a check into her computer and putting false information on it.<sup>4</sup> Her home was in poor condition. Clothes were strewn on the floor in the living room and the minors' bedrooms. A social worker who was collaborating with law enforcement observed that A.L. had a dirty face, and that the minors had dirty feet. E.G. said that mother and John hit each other when they fought, and that mother spanked them if they get into trouble.

Mother was taken into custody and the minors were detained. The police report indicated that mother was a documented Temple Street gang member for 14 years. The Department amended the section 300 petition to allege that mother possessed drug

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<sup>3</sup> The police recovered two methamphetamine pipes and three small plastic baggies with methamphetamine residue on the bed.

<sup>4</sup> When a social worker later asked mother about the statements she made to the police, she denied that she made statements about being involved with identity theft through gang members or a friend.

paraphernalia, took E.G. with her when selling drugs, and allowed known gang members to frequent the family home while in possession of drugs and weapons. The amended petition was sustained and the minors were removed from mother's custody.

On July 18, 2007, mother was released from jail. She told the Department she pled guilty to identity theft and counterfeiting and that, while incarcerated, she had been placed on Trazodone for mental health problems resulting from the loss of the minors.<sup>5</sup> As well, she said she had been diagnosed with bipolar disorder by a therapist in 2006. A few days later mother submitted to a drug test. The lab commented that mother diluted the sample by drinking excessive amounts of water. Mother was ordered to participate in family reunification services that included substance abuse treatment and testing, individual counseling to address domestic violence and mental health issues, psychiatric evaluation and a parenting program.

The minors were placed in foster care.

Subsequently, the juvenile court received a blood test indicating that Joe was N.G.'s biological father. He testified that he first met N.G. a few weeks after she was born. From October 2003 to February or March 2007, they did not live together. He visited every couple of weeks and gave mother money. After March 2007, he helped take care of her on a daily basis. He changed and bathed her and took her to parks. The juvenile court found that Joe was N.G.'s presumed father, and that he was a previously noncustodial parent. On August 15, 2007, she was placed in his custody, and he was granted family preservation services. The juvenile court set a section 364 hearing for N.G. and Joe.

Mother was ordered to participate in substance abuse counseling with random testing, parenting classes, domestic violence counseling, individual counseling, and psychiatric evaluation. In August, September, and October 2007, mother missed most

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<sup>5</sup> Trazodone is a psychoactive compound with sedative, antianxiety, and antidepressant properties.

sessions in her programs. In October 2007, she did not attend any of her individual counseling sessions.

Eventually, E.G. and A.L. were placed with their maternal grandmother.<sup>6</sup> As reported, mother helped maternal grandmother care for E.G. and A.L. on a daily basis and visited N.G. regularly. Paternal grandmother said N.G. wanted to stay with mother. Though mother was consistent with individual counseling and family preservation and completed parenting classes, she had a low level of attendance at her drug program, testing and meetings for alcoholics anonymous and narcotics anonymous. Further, the social worker suspected that mother was continuing her relationship with John.

In a case plan update, the Department expressed concern that due to mother's "constant focus on not accepting the allegations that brought the case to the attention of the [juvenile court], mother is not able to focus on her compliance with her programs. She is willing to provide several reasons as to why she has failed to test on four occasions, or her lack of [consistent] compliance with her programs. During the past six months, [social workers have] consistently . . . reminded mother that she needs to comply with [juvenile court] orders on an ongoing basis. Mother[,] however[,] is so focused on how [the Department] and the [juvenile court] mistreated her that [she] does not understand why she has to complete the programs." The Department reported that while the minors were visiting mother in January 2008, she left them with maternal grandmother and went to John's to pick up presents. An altercation ensued. He was incarcerated as a result. The social worker asked mother about a previous restraining order against John. "Mother stated that the restraining order was temporary and she never filed a permanent one. Mother was concerned about how [the social worker] found out about the incident and stated that this incident was personal and that it did not involve the [minors] and therefore has nothing to do with the case. [The social worker] reminded mother that domestic violence which included a physical altercation with [John] was the

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<sup>6</sup> Although the record is silent, we presume maternal grandfather was no longer living in maternal grandmother's home.

reason why the case was brought to the attention of the [juvenile court] and the [Department].” She called the social worker and said she was advised by her attorney not to give authorization to the social worker to put the incident with John on the Department’s report. Mother later called the social worker and stated that she now authorized reporting the incident.

The social worker observed that N.G. was doing well in Joe’s home. She appeared to be very attached to Joe and paternal grandmother. Joe reported that he drug tested on a regular basis, and that he attended meetings with his parole officer. Pending confirmation of his compliance with the case plan, the Department recommended that the juvenile court terminate jurisdiction as to N.G., award joint legal and sole physical custody to Joe, and grant mother visitation if she complied with the case plan. The Department recommended continued reunification services for mother, E.G. and A.L.

Mother attended a program at the Alcoholism Center for Women. Due to her lack of attendance, the program thought her treatment goals were not being met. Still, she was allowed to continue. A progress report from the Alcoholism Center for Women informed the Department that mother appeared “to have a very low motivation for treatment and does not seem to realize the seriousness of her condition. It is also indicated in the report that mother continues to make excuses for her lack of attendance and seems to believe that every one [*sic*] but herself has caused her present situation.” A subsequent report indicated that mother had attended only nine of 52 domestic violence group sessions required, seven of 52 for anger and addiction, five of 25 for relapse prevention, eight of 18 for parenting, five of 26 for planning groups, three of 26 for trauma, five of 12 for alcohol and education, and five of 12 for HIV/AIDS and smoking cessation. Her drugs tests were negative, but she missed two. The program was unable to test on a weekly basis because mother was inconsistent with her attendance.

Mother was eventually readmitted to the Alcoholism Center for Women under a different contract after she became pregnant.

On March 26, 2008, mother filed a section 388 petition seeking the return of the minors. For changed circumstances or new evidence, mother stated that she was never

given information about juvenile court procedures, she was given wrong or false information by the Department, and she was not given a chance to prove her innocence and have the minors returned. She stated that she completed a parenting class and explained why she did not finish her domestic violence class. She asked the juvenile court to sanction the Department.

In an interim report preceding the section 366.21, subdivision (e) hearing, the Department reported that Joe was participating in family preservation services. He was seeing an in home counselor and receiving lessons regarding parenting, communication and bonding. He completed a substance abuse treatment and recovery program on February 5, 2008. His progress report indicated that he was providing a positive, loving and safe environment for N.G. and she appeared to be healthy, safe and loved by him. He reported that he continued to drug test on a monthly basis and was in compliance with his parole officer. His parole officer reported that Joe was “doing a great job,” his tests were negative, he was always cooperative and available for supervision, and he had changed his lifestyle.

As to mother, it was reported that she completed a parenting class, but her “attendance was not the best.” She was enrolled in a drug program but missed tests on multiple occasions. Further, she did not provide her social worker with proof of attendance at alcoholics anonymous or narcotics anonymous. As a result, the Department concluded: “At this time, the [minors] cannot be safely returned home to the care of mother. Mother has a history of domestic violence with [John]. In addition, the [minors] were detained from mother due to her involvement in illegal activities including but not limited to drugs and drug paraphernalia found in her home. Mother has not completed her drug program and was inconsistent with drug testing. Mother’s overall attendance in her drug program has been poor as she continues to miss groups. Mother has had 10 months to successfully complete all her court ordered programs and has failed to do so.” Additionally, the social worker suspected mother was still in a relationship with John. She was currently pregnant and it was possible that John was the father. The Department recommended that maternal grandmother continue to be the primary caregiver for E.G.

and A.L. It also recommended that mother be allowed to live with them, contingent upon compliance with the case plan.

At the combined section 364, section 366.21, subdivision (e) and section 388 hearing held on May 21, 2008, mother testified that she was readmitted to a drug program and her scheduled graduation was October 17, 2008. Asked why she missed some of her drug program classes, mother offered the following reasons: she moved to a new apartment, she was maternal grandmother's only transportation, she had a psychological evaluation, she had to look for an individual counselor, she had to work nights, she was pregnant, she had to help take care of E.G. and A.L., and she had to take A.L. to see doctors and to the hospital because of asthma. Further, she testified that going to John's trial for domestic violence, and going to court on her own case, made it difficult for her to attend her drug program classes. Finally, mother testified that she saw N.G. once a week, but only if mother had cab fare or if N.G. was brought to a halfway point.

The juvenile court terminated jurisdiction as to N.G. based on a finding that jurisdiction was no longer necessary because she was not at risk in Joe's custody.<sup>7</sup> The juvenile court granted Joe joint legal and sole physical custody. Mother was granted unmonitored visitation. As to E.G. and A.L., the juvenile court found that continuing jurisdiction was necessary because there was substantial evidence that returning them to mother would create a substantial risk of detriment. The trial court based its decision on mother's lack of attendance at narcotics anonymous, her failure to test consistently, and her belated participation in individual counseling. But because the juvenile court found that there was a probability that E.G. and A.L. would be returned to mother by the 18-month date, it ordered the Department to continue providing mother with reunification services. The juvenile court permitted mother to reside with paternal grandmother and the minors.

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<sup>7</sup> Minute orders for prior hearings indicated that proceedings as to N.G. were pursuant to section 364. The minute order for May 21, 2008, however, identified the proceeding as one under section 366.21, subdivision (e). The parties maintain that the juvenile court ruled pursuant to section 364.

Mother's section 388 petition was denied in the ensuing minute order.

Mother filed two notices of appeal. The first appealed the "May 21, 2008[,] order denying return of children to mother per mother's [section] 388 petition." The second appealed the "May 21, 2008[,] order terminating jurisdiction as to N.G. and issuance of exit/family law custody order."

### **APPEALABILITY**

The Department argues that we lack jurisdiction to review the juvenile court's findings and order in connection with the section 366.21, subdivision (e) hearing. Mother contends that we should save this portion of appeal based on a liberal interpretation of her notice of appeal.

If a notice of appeal is ambiguous, there is a rule of law favoring a finding of appealability. (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47.) But that rule "cannot apply where there is a clear intention to appeal from only part of the judgment or one of two separate appealable judgments or orders." (*Ibid.*) Here, mother's notice of appeal reveals a clear intention to appeal from the denial of her section 388 petition rather than the juvenile court's order under section 366.21, subdivision (e).

The question arises whether there is a way to conclude that we have jurisdiction. For a favorable answer, mother places stock in *In re Josiah S.* (2002) 102 Cal.App.4th 403 (*Josiah S.*). But *Josiah S.* does not provide us with jurisdiction. The parent appealed from the denial of a contested hearing at a postpermanency review. On appeal, she argued that the juvenile court also erred by summarily denying her subsequent section 388 petition. The appellate court stated: "While a notice of appeal must identify the particular order being appealed [citation], and 'a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed' [citation], the circumstances here warrant liberal interpretation of appellant's notice of appeal which she prepared herself. The issues appellant attempted to raise in her section 388 petition relate back to material contained within the report prepared for the [six-month review] hearing, which was not received by appellant until the [postpermanency review] hearing.

If she had been granted a contested hearing at the [postpermanency review] hearing, additional evidence may have generated a result which would have made her [subsequent] section 388 petition unnecessary. Or, if the result had not changed, it may have generated further information which appellant could have used in connection with her section 388 petition.” (*Josiah S.*, *supra*, at p. 418.)

There is no parallel between *Josiah S.* and the appeal presented to us now. Mother was not denied information or a prior contested hearing that would have impacted her section 388 petition. Thus, the equities that existed in *Josiah S.* are not at play here. And the *Josiah S.* opinion does not apprise us of the language the appellant used in her notice of appeal and we do not know if it was as specific as mother’s notice of appeal. We decline to follow *Josiah S.* because it ventures away from the general rule and should be limited to its facts.

Nor do cases such as *In re Tracy Z.* (1987) 195 Cal.App.3d 107 (*Tracy Z.*) help. The parent in *Tracy Z.* appealed from the findings at the jurisdictional hearing. On appeal, he argued that his appeal should be liberally construed as one from the dispositional hearing. The appellate court agreed because the jurisdictional findings were nonappealable. It chose to save the appeal and view it as one taken from the dispositional order, which was a judgment. In an appeal from a dispositional order, an appellate court can review jurisdictional findings. (*Id.* at p. 112; *In re Daniel Z.* (1992) 10 Cal.App.4th 1009, 1017 [applying the holding in *Tracy Z.* to save an appeal from jurisdictional findings].)<sup>8</sup> *Tracy Z.* does not apply because the orders under section 366.21, subdivision (e) and section 388 were separately appealable postjudgment orders. (§ 395; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150 [under section 395, all orders following the dispositional order are appealable, except an order setting a section 366.26 hearing].) In other words, when mother appealed from the denial of her section 388 petition, she

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<sup>8</sup> Other cases state that a jurisdictional order is appealable. (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1071.)

was not appealing from a nonappealable order. We do not have occasion to “save” mother’s appeal by construing it as one from the section 366.21, subdivision (e) order.

*In re Keisha T.* (1995) 38 Cal.App.4th 220, another case cited by mother, is similarly inapposite. There, the court held that it could review a conditional order based on the appeal of the subsequent final order under the authority of *Tracy Z.* The court essentially held that the conditional order was reviewable in the same way *Tracy Z.* said jurisdictional findings were reviewable.

Last, mother argues that the “circumstances” warrant liberal construction of her notice of appeal because: her notice of appeal from the denial of her section 388 petition challenged the juvenile court’s decision not to return the minors to her custody; the juvenile court conducted the section 388 hearing as section 366.21, subdivision (e) hearing; the issues were intertwined; the juvenile court never said it was denying her section 388 petition; and there is no prejudice to the Department or Joe. Mother essentially asks us to create jurisdiction where none exists. We lack the power to do so and therefore decline the invitation.

## **DISCUSSION**

### **I. The juvenile court properly terminated jurisdiction over N.G. and granted joint legal and sole physical custody to Joe.**

The parties contend that the juvenile court improperly proceeded under section 364<sup>9</sup> instead of section 366. Mother argues that this error compels reversal. Joe and the Department argue that the error was harmless. And, according to the Department, the issue was waived below.

On both counts, we agree with the Department.

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<sup>9</sup> Section 364, subdivision (c) provides in part: “The court shall terminate its jurisdiction unless the social worker or his or her department establishes by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn.”

A. Waiver.

Mother did not inform the juvenile court that it was applying the wrong standard when it terminated jurisdiction as to N.G. and granted joint legal and sole physical custody to Joe. As a result, it is arguable that mother forfeited the argument and cannot raise it for the first time on appeal. (*In re Anthony P.* (1995) 39 Cal.App.4th 635, 641; *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879 [“an appellate court may allow an appellant to assert a new theory of the case on appeal where the facts were clearly put at issue at trial and are undisputed on appeal[,] . . . [but] ‘if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial[,] the opposing party should not be required to defend against it on appeal’”].)

We reject mother’s contention that we have the discretion to review the asserted error as a question of law based on *In re V.F.* (2007) 157 Cal.App.4th 962, 968. While it is true that we can review a question of law based on undisputed facts (*ibid.*), mother does not contend that the facts are undisputed. Arguments not made are deemed waived or abandoned. (*Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811.) Regardless, there is a controversy as to whether continuing supervision was necessary under section 366 and section 366.21, subdivision (e). The relevant facts and arguments were not developed below, and the controversy impacts the harmless error analysis in part I.B., *post*.

We conclude that mother waived her objection. Our analysis could stop here. Nonetheless, we continue on.

B. Analysis of the merits.

When a child is taken from a custodial parent and placed with a noncustodial parent pursuant to section 361.2, and when both parents are provided with services, review hearings are conducted under section 366, the statute that pertains to dependent children in foster care. (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 264 (*Nicholas H.*); § 361.2, subd. (b)(3).) Section 366 requires a status review hearing at least every six months until a section 366.26 hearing is completed. At the six-month review

hearing pursuant to section 366.21, subdivision (e), the juvenile court is instructed to “order the return of the child to the physical custody of his or her parent . . . unless the [juvenile court] finds, by a preponderance of the evidence, that the return of the child to his or her parent . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.” But section 366.21, subdivision (e) also provides: “If the child had been placed under court supervision with a previously noncustodial parent pursuant to Section 361.2, the court shall determine whether supervision is still necessary. The court may terminate supervision and transfer permanent custody to that parent, as provided for by paragraph (1) of subdivision (b) of Section 361.2.”

Applying section 366 is somewhat of a square peg in a round hole. In *Nicholas H.*, where the child was placed with a noncustodial parent, the court stated: “When a dependent child has been placed with a previously noncustodial parent and both parents have been provided with services, several considerations preclude applying the risk of detriment analysis in the same way it applies in a foster care case. First, in a case like this one, the child has already been placed with a *parent*. Second, the determination has already been made, pursuant to section 361.2, subdivision (a), that a supervised placement with that parent would not be ‘detrimental to the safety, protection, or physical or emotional well-being of the child.’ And third, by extending services to both parents, the court has necessarily identified two distinct potential parental homes for this child, the home of removal and the home of the previously noncustodial parent.” (*Nicholas H.*, *supra*, 112 Cal.App.4th at pp. 266–267.)

*Nicholas H.* held that a finding that the dependent child could be safely returned to his previous home would not be dispositive because it does not address who should have custody. (*Nicholas H.*, *supra*, 112 Cal.App.4th at p. 267.) This conundrum requires an additional inquiry. If the previous home is found to be safe, the juvenile court must apply section 361.2, subdivision (b)(3) and determine “which parent, if either, shall have custody of the child.” When making this determination, the juvenile court must focus on

the best interests of the child. It is not constrained by any preferences. (*Nicholas H.*, *supra*, 112 Cal.App.4th at p. 268.)

The standard for terminating jurisdiction is whether there is still a need for supervision. (*In re Sarah M.* (1991) 233 Cal.App.3d 1486, 1497 (*Sarah M.*), disapproved on other grounds by *In re Chantal S.* (1996) 13 Cal.4th 196, 204.) We apply the abuse of discretion standard when reviewing a juvenile court's decision to terminate jurisdiction after custody has been granted to a noncustodial parent. (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1135 (*Austin P.*).) If a juvenile court fails to consider the need for continuing supervision, its order terminating jurisdiction will nonetheless be upheld if a review of the entire record demonstrates that continued supervision is unnecessary. (*Sarah M.*, *supra*, 233 Cal.App.3d at p. 1500; *In re Janee W.* (2006) 140 Cal.App.4th 1444, 1452 (*Janee W.*).)

The juvenile court did not assess whether continuing supervision was necessary. Inescapably, it erred. The question is whether the error was harmless, i.e., whether the record discloses no need for continuing supervision.

*In Janee W.*, the juvenile court terminated jurisdiction based on the language in section 364. Despite the error, the Court of Appeal affirmed the order. The record disclosed that the children were doing well in the father's custody, his home was safe, and the children were adjusted to living with him. They stated that they liked living with their father and paternal grandmother. The Department recommended terminating the juvenile court's jurisdiction because the father was providing them with adequate care and supervision. The court stated: "That evidence amply supports the finding that continued supervision of the minors was no longer necessary." (*Janee W.*, *supra*, 140 Cal.App.4th at p. 1452.)

In contrast, in *Austin P.*, the Court of Appeal found that the juvenile court properly retained jurisdiction for several reasons: "[The Department] felt it should monitor the boy's transition to father's home because they had sporadic contact during the past 10 years; the [Department] wanted to monitor conflict between the parents to ensure the boy would not be blamed for the dependency; the social worker believed the boy needed both

individual and conjoint therapy with each parent, which could occur only if the matter remained open; the father knew his son was being abused but had taken no steps to protect him and without continuing jurisdiction, the boy's safety could not be assured; there were conflicts between the mother, father, and father's new wife that caused the social worker some concerns; the social worker noted that the boy had previously lived with only mother and was more bonded to her than to father, and sometimes cried and said he wanted to be with the mother; and the mother was making good progress with her reunification plan." (*Janee W.*, *supra*, 140 Cal.App.4th at p. 1453, summarizing the facts in *Austin P.*)

The question we must ask is whether this case resembles *Janee W.* or *Austin P.* It is to that question we turn next.

Mother argues that supervision was still necessary based on the following: Joe met N.G. when she was a few weeks old; from the time she was born to the time she was detained, she lived with Joe and her paternal grandparents for three months; after N.G. was detained, she was placed in foster care until August 15, 2007; mother visited N.G. while she was placed with Joe; maternal grandmother reported that N.G. cried when the visits ended and said she wanted to stay with mother; mother testified that during visits N.G. cried to "come home" and said she missed her sisters; mother declared that N.G. constantly cried and asked to come home during telephone calls, and that paternal grandmother said N.G. cried for mother daily and needed her; mother's counsel argued that the minors should be placed together because a sibling relationship is one of the most important relationships that exists; and by the time of the hearing on May 21, 2008, N.G. had lived with mother for three and a half years and father for only one year.

In mother's view, she was N.G.'s primary parent and placement with Joe "should have been considered only a temporary placement to allow [mother] to rectify her issues and regain custody." Mother contends that *Austin P.* supports her argument. But *Austin P.* is unavailing. It held that "when a nonoffending noncustodial parent requests custody under section 362.1, subdivision (a), he or she is requesting sole legal and physical custody of a child. However, the court may not immediately grant that parent

sole legal and physical custody. The court must first determine whether it would be detrimental to the child to temporarily place the child in that parent's physical custody. If there is no showing of detriment, the court must order the Agency to temporarily place the child with the nonoffending noncustodial parent. The court then decides whether there is a need for ongoing supervision. If there is no such need, the court terminates jurisdiction and grants that parent sole legal and physical custody. If there is a need for ongoing supervision, the court is to continue its jurisdiction." (*Austin P.*, *supra*, 118 Cal.App.4th at pp. 1134–1135.) Simply put, *Austin P.* does not express a preference for placement with the previous custodial parent. And, as we previously indicated, *Nicholas H.* held that there are no preferences.

After scrutinizing the cases, we find *Janee W.* more analogous. The Department reported that Joe complied with the case plan, that N.G. was doing well in Joe's home, and that she was very attached to Joe and paternal grandmother. Because he was providing N.G. with a safe and loving home, the Department recommended that the juvenile court terminate jurisdiction. Perhaps a reason to continue supervision would have been the possibility of eventual placement with mother. But unlike the previously custodial parent in *Austin P.*, mother was not making good progress with her case plan. Her attendance at her drug program was unsatisfactory, and she did not drug test on a consistent basis. Further, the Department suspected that she was still in a relationship with John. Thus, on May 21, 2008, the choice between Joe and mother was a clear one. Joe was the only viable candidate for custody. In total, the evidence demonstrated that supervision was no longer necessary.

Next, mother argues that the juvenile court failed to apply section 366, subdivision (a)(1) at the review hearing. That statute requires the juvenile court to review the status of every child in foster care no less frequently than once every six months. The juvenile court "shall consider the safety of the child and shall determine all of the following": (1) the continuing necessity for and appropriateness of the placement; (2) the extent of the agency's compliance with the case plan in making reasonable efforts to return the child to a safe home and any steps necessary to finalize permanent placement;

(3) whether there should be any limitation on the right of the parent to make educational decisions for the child; (4) the child's siblings relationships and how they should impact placement; and (5) the extent of progress made toward alleviating or mitigating the causes necessitating placement in foster care. (§ 366, subd. (a)(1).)

Mother ignores that N.G. is not in foster care. As *Nicholas H.* recognized, this distinction calls for a different analysis. As *Janee W.* explained, the question presented is only whether continuing supervision is needed. Thus, we need not apply section 366, subdivision (a)(1).

Having considered the evidence and arguments, we conclude that the juvenile court's error was harmless pursuant to *Janee W.*

## **II. Mother forfeited her challenge to the denial of her section 388 petition.**

Despite her notice of appeal from the denial of her section 388 petition, mother ignored the issue in her appellate briefs. We are not required to consider points which are not argued. (*Kim v. Sumitomo Bank of California* (1993) 17 Cal.App.4th 974, 979.) We opt to consider the issue forfeited.

## **III. We lack jurisdiction to review the ruling on the section 366.21, subdivision (e) hearing; if we had jurisdiction, we would conclude that the juvenile court properly found a substantial risk of detriment to the minors if they were returned to mother's custody.**

In our appealability discussion, we concluded that we lack jurisdiction to review the juvenile court's section 366.21, subdivision (e) ruling. Moreover, the issue is moot as to E.G. and A.L. because they are now in mother's custody. From the record, it does not appear that the juvenile court's section 366.21, subdivision (e) order pertained to N.G. Nonetheless, mother contends that the order does pertain to N.G. and that it should be reversed. In order to be thorough, we offer our thoughts regarding the substantial risk finding.

We uphold a juvenile court's finding that returning children to a parent would be detrimental if it is supported by substantial evidence. (*Robert L. v. Superior Court* (1996) 45 Cal.App.4th 619, 625, superseded by statute on other grounds as stated by *In re*

*Adrianna P.* (2008) 166 Cal.App.4th 44, 57–58.) The record contains substantial evidence to support the juvenile court’s order. Mother did not complete her case plan despite having 10 months to do so. Significantly, she did not complete her drug program, nor did she regularly submit to drug tests. The minors were removed from her custody after she was found in possession of drug paraphernalia, among other things. Moreover, mother continued to associate with John and entwine herself in domestic violence. The amended section 300 petition alleges that mother placed the minors at risk of detriment because of her involvement with drugs and John. Just prior to the May 21, 2008, hearing, the Department reported that “it appears that mother has yet to fully address the issues that brought this case to the attention of [the Department].” This led the Department to recommend that mother be allowed to live with maternal grandmother, E.G. and A.L., but only if mother complied with the case plan. Thus, there is an inference that the reasons for the dependency had not been ameliorated, and the minors would be at risk in mother’s custody.

Mother asks us to part ways with the juvenile court’s conclusion. We decline.

Compliance with the case plan is a pertinent consideration at a section 366.21, subdivision (e) hearing. (*Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1341 (*Jennifer A.*) [invoking parallel considerations in connection with the 18-month review hearing].) Indeed, the statute provides that “[t]he failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental.” (§ 366.21, subd. (e)(1).) But failure in this context is relative. Case law does not require strict compliance with the case plan. Substantial compliance suffices. (*Jennifer A.*, *supra*, 117 Cal.App.4th at p. 1343.) According to mother, she substantially complied with the case plan under the authority of *Jennifer A.*

In *Jennifer A.*, the juvenile court ruled that returning the children to their parent would create a substantial risk of harm because she had missed and diluted drug tests. As a consequence, the juvenile court terminated reunification services and set a section 366.26 hearing. The Court of Appeal reversed. The children were detained from the

parent because she left them alone one day she had to work and her arrangement for child care fell through because the caretaker's car broke down. There was "no evidence . . . , other than the social worker's rumination, directly linking marijuana or alcohol use with this lapse in judgment." (*Jennifer A.*, *supra*, 117 Cal.App.4th at p. 1344.) Moreover, the children were not detained due to the parent's drug use, and the section 300 petition did not raise drug abuse as a ground for declaring the children dependents. By the date of the 18-month review hearing, the parent had completed an 18-hour parenting program and attended individual counseling without missing a visit. She had been permitted daily, unmonitored visits with her children. She was in "general compliance" with the case plan. Her therapist reported that she was far from ever leaving her children unattended and had learned proper parenting. The Court of Appeal concluded that the parent had made substantive progress in the treatment programs addressing the problems identified as causing the detention. (*Ibid.*)

Additionally, the *Jennifer A.* court found that returning the children would not pose a risk of detriment. The parent had been employed in the same job for two years, and she received a promotion. There was no concern expressed about her living conditions, and there was no evidence that the parent ever physically or emotionally abused the children. The parent had never been incarcerated, and there was no evidence of mental illness. During a trial period of custody, there were no reports that the parent left the children unattended. The status reports indicated that the parent's parenting skills were continually improving. "There was no evidence [the parent] ha[d] used any drugs other than alcohol and marijuana, or that she ever drank alcohol or smoked marijuana around the children." (*Jennifer A.*, *supra*, 117 Cal.App.4th at p. 1345.) The record did not support a finding that her marijuana use would create a substantial risk of detriment to the children "in light of the factors in this case militating in favor of their return." (*Id.* at p. 1346.) The social worker testified that the parent did not have a drug problem that affected her parenting skills. Thus, the evidence was insufficient "to support a finding that [the parent] could not provide a home 'free from the negative effects of substance abuse.' [Citation.]" (*Ibid.*)

The case was remanded to the juvenile court. In the absence of new evidence of detriment, the juvenile court was directed to return the children to the parent's custody. (*Jennifer A.*, *supra*, 117 Cal.App.4th at p. 1347.)

*Jennifer A.* is not analogous.

The minors were removed from mother due to domestic violence between John and her, and because she exposed the minors to drugs, weapons and known gang members. Unlike in *Jennifer A.*, drugs contributed to the reason for the dependency. While the reason for the dependency in *Jennifer A.* was ameliorated, that was not true for the dependency of the minors. Mother was inconsistent with her programs and did not finish drug rehabilitation. As late as January 2008, she refused to accept the allegations that resulted in the minors' dependency, and she did not understand the need to complete her programs. She continued to associate with John and, in most likelihood, conceived a new child with him. Instead of acknowledging that she should not be associating with John, she was concerned with how the social worker discovered the incident. Mother told the social worker that the matter was personal and did not involve the minors or the case. Though she later changed her mind, mother tried to coerce the social worker into keeping silent.

Mother's actions demonstrate that nine months into the dependency proceedings she had not come to terms with the risks that her lifestyle posed to the minors.<sup>10</sup> There is ample authority supporting a finding that she was not ready for custody. "Reunification and successful treatment cannot occur until [the parent] accepts responsibility for her actions. [Citation.]" (*In re Andrea G.* (1990) 221 Cal.App.3d 547, 553.) A parent's refusal to acknowledge her wrongdoing and grasp the problem supports a finding that

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<sup>10</sup> Mother states that she "recognized her mistakes and took responsibility for her actions." She did not provide a citation to the record. We are not obligated to comb through the record on mother's behalf. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [As a general rule, the reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment].)

returning a child to her custody would be detrimental. (*In re Jessica B.* (1989) 207 Cal.App.3d 504, 516 (*Jessica B.*.)

According to mother, the juvenile court did not identify “how the lack of progress it believed [mother] had shown translated into a risk to the [minors]. That is because there was no evidence to show any risk.” Mother points out that she had unmonitored weekly visits with N.G. and was involved in the daily care of E.G. and A.L. At the May 21, 2008, hearing, the Department recommended that mother be allowed to live with maternal grandmother.

Impliedly, the juvenile court found that mother’s lack of commitment to the case plan and lack of understanding of her wrongdoing called her judgment into question. Also, the juvenile court impliedly found that without the steadying influence of maternal grandmother, there was a risk that mother would revert to her old ways and once again expose the minors to domestic violence and drugs. We uphold implied findings if they can be reasonably deduced from the facts. (*In re Joshua R.* (2002) 104 Cal.App.4th 1020, 1028.) Based on *Jessica B.*, these implied findings are easily deducible and support the juvenile court’s decision.

### **DISPOSITION**

The juvenile court’s orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, Acting P.J.  
DOI TODD

\_\_\_\_\_, J.  
CHAVEZ